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Supreme Court of the United States

OCTOBER TERM, 1961

No. 664

MRS. VIRGINIA KELLY, CURTIS MELANCON, HENRY MELANCON, JR., MRS. ELLA LOVIG and LYNN MELANCON,

Petitioners,

versus

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1961

No.

MRS. VIRGINIA KELLY, CURTIS MELANCON, HENRY MELANCON, JR., MRS. ELLA LOVIG and LYNN MELANCON,

Petitioners,

versus

HARTFORD ACCIDENT & INDEMNITY COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Plaintiffs-appellants petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in this case on August 16, 1961, and September 19, 1961.

OPINIONS BELOW

The district court rendered no opinion. The majority opinion of the court of appeals is reported at 294 F. 2d, pp. 400 to 403, the dissent is reported therein from pp. 403 to 409, and, on petition for rehearing, the *per curiam* is reported therein on p. 409 (App. A, infra.).

JURISDICTION

The decree of the court of appeals was rendered and entered on August 16, 1961, and the *per curiam* denying rehearing was rendered and entered on September 19, 1961. By order dated December 19, 1961, Mr. Justice Brennan extended the time for filing a petition for writ of certiorari to and including January 17, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the individual claims of surviving brothers and sisters, for the wrongful death of their deceased sister, are separate demands so that each must meet the jurisdictional amount requisite for federal jurisdiction, or whether it suffices that they collectively exceed the sum of $10,000.00.

2. Whether a federal court should summarily make an initial interpretation of a state statute, or should postpone such determination until that state's appellate courts have resolved the novel question through a pending appeal in a related state court case.

3. Whether a husband's liability to recover damages, for his wife's death resulting from his own negligence, constitutes a "default" on his part within the meaning of the Louisiana Wrongful Death Statute, thereby enabling collateral survivors to assert such a claim against the husband's insurer under the Louisiana Direct Action Statute?

STATUTES INVOLVED

Title 28, United States Code Annotated, §1332, provides in pertinent part:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States;"

Article 2315 of the Louisiana Civil Code, this state's wrongful death statute, in effect at the time the instant cause of action arose, provided in pertinent part:

> "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving blood brothers and sisters, or either of them, for the space of one year from the death. However, should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and the minor children. The right of action shall accrue to the major children only in those cases

> where there is no surviving spouse or minor child or children.
>
> . . .
>
> The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be."

Title 22, Louisiana Statutes Annotated, §655, provides in pertinent part:

> "The injured person or his or her survivors or heirs . . . shall have a right of direct action against the insurer . . . and said action may be brought against the insurer alone . . . It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable."

STATEMENT OF THE CASE

Plaintiffs are the brothers and sisters of decedent, who was fatally injured in an automobile accident on January 15, 1959 in Lafourche Parish, Louisiana. Decedent was a guest passenger in an automobile operated by her husband at the time. The husband negligently drove his automobile on the wrong side of the roadway and caused a head-on collision with an oncoming truck. Decedent was killed instantly, expiring at the scene.

Plaintiffs brought an action in the state court for that parish[1] against the husband's insurer pursuant to the Louisiana Direct Action Statute[2]. Each petitioner claimed the sum of exactly $10,000.00, covering his or her claim for damages for the decedent's pain, the economic value of decedent's life, and the petitioner's loss of affection, companionship and assistance.

The defendant insurance company removed this action from the state court to the federal court by reason of diversity of citizenship between the parties[3].

Defendant, through the affidavit of its representative,[4] showed that it was defending a suit by the husband against the same defendant in a different parish[5], wherein the husband was demanding damages as a result of the death of his wife. Defendant did not remove the husband's state court suit to the federal court, but is litigating that suit through the state courts (App. B., infra).

THE FACTS

Defendant sought and obtained in the district court dismissal of the instant action on the ground that plaintiffs' complaint fails to state a claim against defendant upon which relief can be granted because plaintiffs in this suit

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[1]Proceedings No. 14,346, of the docket of the 17th Judicial Court for Parish of Lafourche; T. p. 4.

[2]La. Rev. Stat., 22:655.

[3]T. p. 2.

[4]T. p. 10.

[5]Proceedings No. 54,138 of the docket of the 24th Judicial District Court for the Parish of Jefferson.

are without right to bring this action under the law of Louisiana.[6]

Plaintiffs moved the district court to postpone determination of the dismissal motion until there would be resolved the exception of no right of action asserted by defendant against the decedent's husband in the state court proceedings,[7] which was denied. The court of appeals refused to decline jurisdiction because of lack of requisite amount.[7A]

REASONS FOR GRANTING THE WRIT

I.

The court of appeals erred in holding that the individual claims of the plaintiffs, none of which exceeded $10,000.00, should be considered collectively in determining jurisdictional amount.

Under Louisiana law the only claim inherited by the survivors was the decedent's claim for pain and suffering. Since the decedent died instantly, or almost instantly, her pain of a few minutes, if not seconds, duration could not possibly exceed $10,000.00. Louisiana law does not allow damages for the economic value of a decedent's life.

The principal claim herein, and probably the only claim cognizable by Louisiana law, is the claim for loss of companionship and assistance. This claim vests in each brother and sister individually, and, in fact, would vary in

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[6]T. pp. 9 and 13.
[7]T. pp. 12 and 13.
[7A]Pp. 32 and 33 infra.

amount according to the particular claimant's relationship to and closeness with the decedent.

An aggregation of plaintiffs' claims cannot be made in order to obtain the requisite federal court jurisdictional sum, merely because they have a community of interest; *Thomson v. Gaskill*, (1942) 62 S. Ct. 673, 315 U.S. 442; *Alberty v. Western Sur. Co.*, (C.A. Okla., 1957) 249 F. 2d 537; *Garfield v. Heyden Newport Chemical Co.*, (D.C. N.J., 1959) 172 F. Supp. 230. Parties cannot by consent invest a federal court with jurisdiction it would otherwise lack, *People's Bank v. Calhoun*, 102 U.S. 256, and there is no conferring of jurisdiction by estoppel, *Poole v. Lykes Bros. S. S. Co., Inc.*, (C.A., 5th, 1960) 273 F. 2d 423. Jurisdiction may be questioned by either party at any time, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534.

II.

The defendant, by the stratagem or maneuver of *removing only one of the related state court cases to the federal court*, has placed the instant plaintiffs in an impossible position, namely: If the Louisiana appellate court, wherein the husband's state court suit is presently pending awaiting hearing,[7a] should disagree with the federal courts' interpretation of Louisiana law, and should hold that the husband does not have a right of action, indicating that the brothers and sisters do have a right of action, then the petitioning brothers and sisters would be without a remedy. Their claims would be time-barred; the Louisiana statute of limitations is one year. And, if the federal court ap-

[7a] Appendix "B", p. 34 infra.

plication for writ is declined and this case is not held in abeyance, as petitioners have sought to accomplish by asking for postponement, then their claim is lost as a matter *res adjudicata.*

Defendant had the choice of adjudicating both suits, the husband's suit as well as the instant one, in the state courts, or removing both to the federal court. By removing only one suit this defendant hoists petitioners, and others, on the horns of an impossible dilemma. The right of removal is intended to foster, not obstruct, the administration of justice.

The trial court's exercise of discretion in failing to grant a continuance is reviewable; 6 Moore's Federal Practice, §59.15 (3), and n. 42, p. 3906, n. 56 pp. 3908 and 3909.

The term "discretion", when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interests of justice; *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243.

III.

On the question of interpretation of the substantive law of Louisiana, it almost approaches a platitude for petitioners to urge, as indeed they do, that the dissenting opinion below is the valid one. Also, petitioners could hardly state their case better than Judge Cameron did for them, in the 12 pages of his dissent, which is twice as long as the controlling opinion of the other two judges.

As Judge Cameron stated, the Louisiana law is unsettled on this question, and there is no precedent for guidance.

If the federal courts must or will resolve this question of first impression involving Louisiana law, they should interpret the statutory verbage "in default of" to mean "in the event of non-recovery" or "due to inability of" rather than "in the absence of."

Defendant's succinct contention is: *The mere existence of the husband precludes any suit by the collateral survivors for the cause of action arising from the husband's negligence.*

If the defendant can prevail on such a proposition, we would then have the following untenable corollaries: That in the case of such a wrongful death there would be a right without a remedy (or conversely, a remedy with no right); or that a husband could wantonly, negligently cause the death of his wife, with impunity from civil liability; or that a hiatus would be created in the Louisiana Direct Action Statute, which is designed to provide that insurance is deemed to be for the benefit of the claimant.

Article 2315 with almost Biblical simplicity, provides: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."*

This article, in so-called "derogation of the common law," covered the instant situation. The negligent act of the husband caused damage to another person, namely, his wife, thereby obliging the husband by whose fault it happened to

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*Article 2315 of the Louisiana Civil Code was amended by its Legislature through Act 30 of 1960, making the right to recover damages a property right.

make repair. The husband has provided for the repair by payment of the insurance premium to this defendant.

The "Lord Campbell's" clause of the article provides that: "the right of this action shall survive in case of death." Of course, the right of action which survives in the instant case is the action against the husband whose act of fault damaged his wife.

The three classes of survivors, created by the Articles are: (1) the children or spouse of decedent ["The right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor children."]; (2) parent of the deceased; or (3) surviving brothers and sisters. The article provides that in the default of one class, the right of this action shall survive in favor of the next class.

The delineation in the instant case is quite simple. The decedent here had no children. By operation of law the husband of decedent can not recover for his own negligence; he is the very person giving rise to the cause of action, therefore, he can not preclude it; he cannot be both defendant and plaintiff, both tort-feasor and claimant; he cannot sue his insurer for the wife's death caused my him.[9] In fact, these are the very allegations which the same defendant at bar is in effect making in the other state court proceeding brought by the husband.

There is no child or parent who can claim; there is no

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[9]Addison v. Employers Mutual Insurance Co., (La. App., 1st Circt., 1953), 64 So. 2-d 484.

husband who can claim. In their default the right of this action exists in favor of the surviving brothers and sisters, who are the instant petitioners applying for writ.

There is no reported Louisiana case precisely in point. None has been previously presented where the husband's default and inability to act result from the fact that he is the very person whose negligence gives rise to the cause of action.

The Louisiana case of *Goodwin v. El Dorado Baking Company*, (La. App., 2nd Circt., 1947) 31 So. 2d, 230, is far afield from the one at bar. The Goodwin case simply holds what the codal article spells out, namely, that a spouse has the right of action against a tort-feasor to the exclusion of a major child. The major child in that case tried to sue the third party causing the death of the parent, circumventing Article 2315 by contending that because the major child was insane she occupied the same status as a minor. As the Court pointed out, "There is no relationship between insanity and age."

The Federal case, *McDonald v. Employers Mutual*, (W.D., La., 1947) 73 F. Sup. 198, has no application here; there a parent sued for wrongful death, alleging that his decedent was unmarried, whereas the evidence showed that this allegation was inaccurate because the decedent had a surviving wife. There was no reason whatsoever why the right of action there should not survive to the spouse in preference to the parent, nothing to place the spouse in default.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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January 12, 1962

CERTIFICATE

It is certified that a copy of the foregoing application has been served upon opposing counsel by placing same in the mails addressed to counsel, postage prepaid.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18455

MRS. VIRGINIA KELLY, CURTIS MELANCON, HENRY MELANCON, JR., MRS. ELLA LOVIG and LYNN MELANCON,

Appellants,

versus

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(August 16, 1961)

Before RIVES, CAMERON and JONES, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a judgment sustaining the defendant's motion to dismiss the plaintiffs' action for the wrongful death of Mrs. Lillian Melancon Adams. The complaint alleged that on January 15, 1959, Mrs. Adams was a guest passenger in an automobile operated by her husband, Andrew P. Adams; that "the automobile was caused to be in collision with a truck, when the automobile went into the opposite and oncoming traffic lane"; that Mrs. Adams' husband "negligently failed to keep a proper lookout ahead, to maintain his automobile under proper control, to stay in his own traffic lane, and to otherwise operate the automobile in such a manner as to have avoided the collision"; and that "as a result of

the collision Mrs. Lillian Melancon Adams sustained severe personal injuries which were fatal to her."

The plaintiffs are the brothers and sisters of Mrs. Adams. She is survived also by her husband, but not by any descendants or ascendants. The action in brought, pursuant to Louisiana Revised Statutes of 1950, 22:655, directly against the liability insurer of Mrs. Adams' husband. The defendant moved to dismiss the action on the ground that the plaintiffs are without right to bring this action under the law of Louisiana. Attached to the motion to dismiss is an affidavit of one of defendant's attorneys to the effect that the husband, Andrew P. Adams, has filed suit against the defendant in a Louisiana State court for the wrongful death of his wife, asserting the identical cause of action being asserted by her brothers and sisters, except that damages are demanded on behalf of the husband.[1]

The district court, without opinion, granted the defendant's motion and dismissed the action. This appeal from that decision turns upon the construction of the Louisiana wrongful death statute as it existed at the time of decedent's death,[2] in part as follows:

> "*Art. 2315. Liability for acts causing damage; survival of action*

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[1]We are informed by the appellants that the state trial court dismissed the husband's action against his insurer for his wife's death, basing its decision on the case of Addison v. Employers Mutual Liability Insurance Co. of Wisconsin, La. App. 1953, 64 So. 2d 484, discussed later in this opinion, and that an appeal has been taken from said dismissal

[2]The statute was amended by Acts 1960, No. 30, §1.

"Art. 2315. Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving blood brothers and sisters, or either of them, for the space of one year from the death. However, should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and the minor children. The right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

. . . . . .

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be." L.S.A. C.C., Art. 2315.

The appellants suggest that decision on appeal of the husband's action in the state court proceeding should be awaited. The present appeal was submitted on December 1, 1960, more than eight months ago, and we think that its decision should not be longer delayed, inasmuch as the majority of this Court agree with the district court

that, irrespective of whether or not the husband is ultimately held to have a right to sue his insurer, the decedent's brothers and sisters are without right to bring this action under the law of Louisiana.

In *Dowell, Inc. v. Jowers*, 1948, 166 F. 2d 214, 219, this Court, with Judge Lee, a distinguished Louisiana lawyer and judge, as its organ, construed the Louisiana wrongful death statute as follows:

> "A careful reading of the parts set forth above and of Louisiana case law on the subject shows that under the article two causes of action are given to the named beneficiaries, one the survived action, i.e., the action which the deceased had at the time of death; the other an action given by the Code to the named beneficiaries in their own right for the damages they suffer by reason of the death of their decedent. Eichorn v. New Orleans & C. R. Light & Power Co., 112 La. 236, 36 So. 335, 104 Am. St. Rep. 437; Reed v. Warren, 172 La. 1082, 136 So. 59; Voss, 'The Recovery of Damages for Wrongful Death,' etc., 1931, 6 Tulane L. R. 201 et seq."

The appellee questions whether that construction is really in accord with the decision of the Supreme Court of Louisiana in *Reed v. Warren*, 1931, 136 So. 59. The construction asserted in *Dowell, Inc. v. Jowers, supra*, has not been authoritatively corrected by the Louisiana state courts, and the appellants insist that it is correct. See also 16 Tulane L. Rev. 409, 413, n. 190. We agree with the appellants to that extent, but we think that the brothers and

sisters neither succeed to the decedent's claim for her own injury nor have any independent right to damages such as loss of affection, etc. suffered by reason of the death of their sister.

That the brothers and sisters do not succeed to the decedent's claim for her own injury would appear to be settled by the decision in *Addison v. Employers Mutual Liability Insurance Co. of Wisconsin*, La. App., 1953, 64 So. 2d 484. In that case, Mrs. Addison sued her husband's liability insurer for injuries allegedly resulting from her husband's negligence and, while her suit was pending, Mrs. Addison died. Her children who were all majors were made parties plaintiff in place of the deceased. Despite the fact that the husband was the alleged tort feasor, the appellate court held that "exception was properly taken" to the substitution of the children as parties plaintiff, and that the husband "succeeds to her claim and stands in her shoes." The husband was denied recovery because "the obligation was extinguished by confusion when plaintiff's wife died and he succeeded to her rights."

As to any independent right of the brothers and sisters to damages such as grief, loss of affection, etc. suffered by reason of the death of their sister, the general rule of construction has been thus stated:

> "But time and time again our courts have reiterated the definite principle that *the right* of action for damages for the death of a human being is in derogation of a common right and cannot be extended by implication to other surviving relations

than those to whom it is expressly granted by statute."

Goodwin v. El Dorado Baking Co., 2d Cir., 1947, 31 So. 2d 230, 232, 233.

In that case it was held that an insane daughter above the age of majority had no right of action for her mother's death where the decedent was also survived by her husband. The decision of that case was made easier by the plain language of the last sentence of the first paragraph of Article 2315, *supra*, which was quoted by the Court with emphasis: "*The right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.*"

Here the appellants argue that the earlier expression, "in default of any of the above persons," is more ambiguous, and should be construed to mean "in event of non-recovery" by the earlier ranking beneficiaries. To support that argument, the appellants rely not on the decisions, but on law review articles simply stating the opinions of the authors as to a rule or interpretation which would be "more just." 6 Tulane L. Rev. 201, 236; 16 Tulane L. Rev. 386, 412. The adoption of a "more just" State law is not a matter for the consideration of a federal court, but is appropriately addressed to the State legislature.[3]

The rule of strict construction asserted in *Goodwin v. El Dorado Baking Co., supra*, by which we are bound under

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[3]Indeed, some of the suggestions in the Law Review articles may have been adopted by the 1960 Amendment referred to in footnote 2, supra.

the Erie doctrine, forbids us so to extend the right of recovery under the statute. "In default of" is used synonymously with "where there is no" as that phrase appears in the last sentence of the first paragraph of Article 2315, *supra*, heretofore quoted. That use reinforces our view that the ordinary and natural meaning of the phrase "in default of" appears to be "in the absence of," and that it was so employed in Article 2315.

It seems clear to us that, Mrs. Adams having left a surviving husband, her brothers and sisters neither succeeded to her claim for her own injury, nor were granted any independent right of action for grief, loss of affection, or other damages suffered by reason of the death of their sister. The judgment is therefore

AFFIRMED

CAMERON, Circuit Judge, Dissenting

I.

This action was disposed of by the court below upon a motion to dismiss.[1] The sole legally recognized ground upon which the motion to dismiss was based was that provided by Rule 12 (b) (6): "Failure to state a claim upon which relief can be granted." This action was brought under the Louisiana Wrongful Death Statute,[2] the opening sentence of which is: "Every act whatever of man that causes damage to another obliges him by whose fault

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[1] "On motion of defendant to dismiss, it is ordered that the same be, and the same is hereby, granted, and case is dismissed."

[2] LSA Civil Code §2315.

it happens to repair it . . . " The complaint alleged that the act which caused the death of Mrs. Lillian Melancon Adams happened by the fault of her husband Andrew P. Adams.[III] The complaint also alleged that appellants here are the only persons surviving having a legal right of action to assert the survival and wrongful death claim.[IV]

The action was brought against Hartford Accident & Indemnity Company, which, under the allegations of the complaint, "had in full force and effect a policy of insurance providing liability insurance coverage covering the automobile, its operator, the guests therein, and the parties and subject matter of this petition, and, as such, the said defendant insurance company is directly liable to petitioners pursuant to Louisiana Revised Statutes of 1950,

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[III] "On January 15, 1959, petitioners' decedent, Mrs. Lillian Melancon, late wife of Andrew P. Adams, was a guest passenger in the automobile operated by her said husband . . .

"At the said time and place the automobile was caused to be in collision with a truck, when the automobile went into the opposite and oncoming traffic lane; . . .

"The operator of the said automobile negligently failed to keep a proper lookout ahead, to maintain his automobile under proper control, to stay in his own traffic lane, and to otherwise operate the automobile in such a manner as to have avoided the collision.

"As a result of the collision Mrs. Lillian Melancon Adams sustained severe personal injuries which were fatal to her . . . "

[IV] "Petitioners are the brothers and sisters of decedent; and she is not survived by any descendents or ascendents; . . .

"The decedent's claim for personal injuries and death survive in favor of petitioners, who, as her brothers and sisters, are the only persons having a legal right of action to assert the survival and wrongful death claim resulting from the negligence of decedent's husband;

"Petitioners itemize their claims for damage for the pain and suffering of decedent, the economic value of her life, and petitioners' loss of affection, companionship and assistance . . . "

22:655.[v] The policy was not before the court below so that its terms were not considered by it in passing on the motion to dismiss.

Professor Moore states the function of such a motion to dismiss in these words: "The motion to dismiss under Rule 12 (b) (6) performs substantially the same function as the old common law general demurrer . . . For the purpose of the motion, the well pleaded material allegations of the complaint are taken as admitted . . . "[vi]

It appearing, therefore, from the complaint that Mrs. Lillian Melancon Adams was killed by the fault of Andrew P. Adams, that the appellee had in effect a policy of insurance which under Louisiana law covered the fatal injuries and damages sued for, and that the claim for personal injuries and death of the decedent survived in favor of appellants' and that these averments are admitted by the motion to dismiss, it seems clear to me that the court below committed plain error in granting said motion.

II.

The inexorable result thus ensuing was sought by appellee to be avoided by the expedient of adding to the

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[v]Which reads in part as follows:

"It is also the intent of this section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insureds or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort feasor within the terms and limits of said policy."

[vi]2 Moore's Federal Practice, 2d Ed., p. 2244; Hydro-Carbon Production Co., Inc. v. Valley Acres Water District, et al., 5 Cir., 1953, 204 F. 2d 212, 216; and Olan Mills, Inc. of Tennessee v. Enterprise Pub. Co. et al, 5 Cir., 1954, 210 F. 2d 895, 897.

language of Rule 12 (b) (6) F.R.C.P. above quoted the statement: " . . . in that the plaintiffs in this suit are without right to bring this action under the law of Louisiana." This averment of the motion to dismiss was supported by the affidavit of the attorney for appellee informing the court that he was representing appellee in a State Court suit brought by Andrew P. Adams demanding damages for the injury to and death of his wife.[vii] The effect of this affidavit is to make it appear that such a suit had been brought and that the attorney appearing in this action was defending that suit. It is difficult to perceive that the affidavit establishes *as a fact* what the attorney says were the contentions of the parties to that suit. The record contains no further information about the suit.

Nothing in the affidavit purports to challenge the allegations of the complaint that Mrs. Adams was killed by the fault of her husband and that the policy of the appellee was in effect and created the liability quoted from the Louisiana Statute, supra. At most, the affidavit can be interpreted only as a sort of lefthanded denial of the allegations of the complaint that the claim of Mrs. Adams' injury and death

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[vii] " . . . that, on behalf of Hartford Accident and Indemnity Company, appearer, in his capacity as attorney at law, is defending a suit pending in the Twenty-fourth Judicial Court for the Parish of Jefferson, entitled 'Andrew P. Adams v. Hartford Accident and Indemnity Company and State Farm Mutual Automobile Insurance Company,' being No. 54-138 of the docket of said Court; that said suit is brought by Andrew P. Adams, the husband of Lillian Stella Melancon, deceased, demanding damages as a result of the death of his wife caused by injuries sustained in an automobile accident occurring on January 15.1959 in the vicinity of Mathews, Louisiana, and is the identical cause of action being asserted by the brothers and sisters of decedent Lillian Stella Melancon in this suit except that damages are demanded on behalf of the husband."

survived in favor of the appellants and that they were the only persons having a legal right to action to assert the survival and wrongful death claim. Assuming that the affidavit is sufficient to raise an issue as to this material fact, the action should have been handled as pending before the court below upon motion for summary judgment.[viii]

Neither the appellee nor the court below handled the matter as one pending upon motion for summary judgment, and appellants were never called upon to proceed as provided by Rule 56. If they had been called upon to answer a motion for summary judgment, they would have had the benefit of taking depositions, calling for admissions, and utilizing the other procedures provided by Rule 56. If given the opportunity, they might have developed that they could discover a means by which this disjointed action might have been put back together. The parties are proceeding here under the dilemma of being faced with this action, which was removed to the court below by the appellee, and the State Court action brought in by the affidavits attached to appellee's motion to dismiss. Appellee chose to litigate half of the claim against it in a State Court of Louisiana and the other half in the Federal Court. It had the right to insist that all parties be made parties to one suit. *Reed v. Warren*, S. Ct., La., 1931, 136 So. 59, 62.

[viii]Rule 12 (b) F.R.C.P.:

"... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

At all events, the course taken by appellee has resulted in nothing more favorable to it than the raising of an issue of fact between the allegations of appellants' complaint that they are the sole beneficiaries under the Louisiana Statute, and the assertion that a person, the attorney assumed to be the husband of the decedent, had instituted a suit in a Louisiana Court claiming that he, as the husband, was owner of part of the claim for her wrongful death. It seems clear to me that such an issue cannot be settled under a motion to dismiss, and if the court below had proceeded, as I think it should have, under Rule 56 F.R.C.P., it would have been faced with an issue of fact calling for a jury trial or, in any event, not susceptible of handling under summary judgment procedures.

III.

Assuming, however, that the foregoing considerations are invalid and that there was presented to the court below only a question of law, based upon the assumption that the husband has survived and is asserting his action for his wrongful killing of his wife, I will proceed to a discussion of some of the Louisiana cases on the question of whether his mere survival will defeat the right of appellants to recover altogether. It is appellants' position that, since there is no one in existence in any class ahead of them except the husband, and since this action is based upon his negligence as the sole cause of her death — a matter not disputed in any way in this record — the claim for the wrongful injury to and death of Mrs. Adams succeeds to them under the Louisiana Lord Campbell's Act quoted in the majority opinion. Both parties agreed that there is no Louisiana case directly sustaining the contentions of

either of them on the point;[ix] nor have I been able to find any Louisiana decision which seems directly controlling. The course of decision in Louisiana, under Article 2315 of the Civil Code, has certainly been attended by travail and is not free from what appears to me to be conflict and confusion.

Appellants take the position that the Louisiana statute states categorically: "Every act whatever of man that causes damage to another, brings him by whose fault it happened to repair it." They contend that the residue of the statute concerns itself solely with a definition of rights as between the different classes of those who may enforce the cause of action thus unequivocally given.[x]

Forgetting for a moment the tortuous course of construction the statute has taken, it seems that the definition of the meaning of the crucial word "default" should be simple.[xi] From this definition it is clear that the word

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[ix]Appellants state in their brief, "There is no reported Louisiana case precisely in point," and appellee comes back with the assertion that, "We have been unable to find a Louisiana case where the collateral relatives had the temerity to assert a cause of action which survived to the husband under the plain provisions of Article 2315 of the Louisiana Civil Code."

[x]The parties agree that there are three classes of survivors: class one, minor children and spouse; class two, father and mother; and class three, blood brothers and sisters; and that appellants belong to class three, and that no children or parents survived the decedent.

[xi]Webster's New World Dictionary of the American Language, College Edition, page 384, defines "default" thus: "1. failure to do something or be somewhere when required; . . . 2. failure to pay money due. 3. failure to appear in court to defend or prosecute a case. v.i. 1. to fail to do something or be somewhere when required. 2. to fail to make payment when due. 3. to fail to appear in court. 4. to fail to take part in or finish a contest. 5. to lose by default. v.t. 1. to fail to do or pay . . . 2. to fail to take part in or finish . . . 3. to lose . . . by default; forfeit."

means fundamentally "to fail." It would follow logically that, if the members of class one failed to assert the right given them, those of the second class would be invested with the power to assert the right; and so on through the classes.

The courts of Louisiana certainly seemed, in the earlier cases, to give the word quite a different meaning and to interpret it as having the signification of "in the absence of a person of higher class." The case of *Kerner et al v. Trans-Mississippi R. Co. et al.*, 1925, 104 So. 740, is one of the most cited cases. It held that, in that case, the surviving mother of an injured man alone acquired a right of action for damages as the result of his death; that she had the absolute right to dispose of the claim, and it added as dictum that, even if she had announced that she abandoned the right of action, or that she would allow it to prescribe, it would not have given a right of action to the surviving brother and sisters of the deceased.

But this decision has been criticised by law writers, as evidenced by an article in 6 Tulane Law Review by Voss saying, at page 236:

> "It would be more just to interpret 'in default' to mean merely 'in event of non-recovery' by the first ranking beneficiary, so that a mere failure, for any reason, on the part of the first ranking beneficiary to exercise his right of action, would not bar the recovery of damages by the beneficiaries next in line under the provisions of Article 2315. This could not do violence to the legislative intent, since the fact that the more remote

> beneficiaries are specifically named in the Article is conclusive evidence that they were intended to be benefitted when the immediate beneficiaries were not.[xii]

Listed under the 1960 Amendment of Article 2315 are thirty-six law review articles showing how the treatment of the statute by the courts has evoked discussion by law writers.

It is noteworthy that the annotator of the Louisiana Code states under the 1960 amendment[xiii] that such landmarks as *Kerner* supra, and *Chavers v. Roger*, 1898, 23 So. 100, and the cases following those cases have been rejected by the 1960 amendment, and refers to a number of other changes liberalizing its application as among the several classes.

Appellant's claim that the husband, undisputed possessor of the claim for his wife's death as a class one claimant under the statute, is under the disability of being the tort feasor whose negligence was the sole proximate cause of her death; and that the statutory right to recover therefor never vested in him, because the law devolved it before it was born.

Appellee and the majority rely heavily upon the decision

[xii]Appellants point out too that this article is given convincing force by the fact that it was cited with approval by Judge Lee, a Louisiana lawyer and judge of long experience, speaking for this Court in Dowell Inc. v. Jowers, et al. 1948, 166 F 2d 214 certiorari denied 68 S Ct 1346 The entire article should be read if one is to acquire an insight into the varied constructions put upon this statute by Louisiana Courts

[xiii]LSA Civil Code, Volume 9, 1960, Pocket Parts, pp 5-6

of the Court of Appeal of Louisiana, First Circuit, 1953, in *Addison, et al v. Employers Mutual Liability Insurance Co. of Wisconsin,* 64 So. 2d 483, as coming close to the position asserted by appellee here. Cleo B. Addison had sued her husband's insurer because of negligent injuries inflicted on her by him. Before the exception of no cause of action filed by the insurance company could be acted upon, Mrs. Addison died, and her children, all majors, were made parties plaintiff in place of the deceased. When the insurance company complained of this, the husband filed a motion to be made plaintiff in place of Mrs. Addison on the ground that his wife's right of action accrued to him. To this position, the insurance company also excepted. The trial court sustained the exception of no cause of action, and the husband appealed to the Court of Appeal, which affirmed. Its opinion quoted approvingly from other Louisiana cases holding that the insurance company would not be liable in any case in which the insured himself would not have been liable. The court emphasized that Mrs. Addison did have a cause of action against the husband, but that she could not enforce it. It held, arguendo, that theoretically she could enforce her cause of action against her husband by bringing a suit against his insurer and recovering from it any amount which her husband was obligated to pay her but for the defense of coverture, which the insurer could not invoke.

The court concluded, however, that the husband, Mr. Addison, could not maintain the suit against his insurer, because he could not sue himself. This, the court thought, resulted from the provisions of Article 2217 of LSA Civil Code, which provided that when the assured became not only the debtor but the creditor as well, no matter by

what process he became the creditor, there arose a confusion of rights which extinguished the obligation. Its holding was, therefore, that the obligation existing initially in favor of Mrs. Addison had become extinguished by confusion when her husband, the tort feasor, succeeded to her rights.[xiv]

Appellants contend that the cases last discussed are overruled by the case of *Dumas, Appellant-Appellee v. United States Fidelity & Guaranty Co., Appellee-Appellant*, Ct. App. La., 3 Cir., 1960, 125 So. 2d 12. John Dumas was injured December 15, 1960 while riding in a car driven by his wife, and he brought suit for damages against her liability insurer. The insurance company stipulated, when the case was called for trial, that Mrs. Dumas was guilty of actionable negligence. Before the trial was completed John Dumas died of natural causes. His widow, a major daughter by a former marriage, and the executor of his estate filed a joint motion asking that all three be substituted as parties plaintiff and be permitted to continue the prosecution of the suit. The trial judge ruled that the executor alone, and not the widow or daughter, was entitled to be substituted as a party plaintiff, and awarded the executor total damages of $12,996.99, including medical expenses, loss of earnings and general damages.

The trial judge characterized his task as one of "resolving the perplexing legal problems" created by the "difficulty of reconciling the jurisprudence of our Supreme Court and our Courts of Appeal interpreting Code of Prac-

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[xiv]And cf. Young v. McCullium et al., Ct. App., La., 1 Cir., 1954, 74 So. 2d 339; and Perot et al. v. United States Casualty Co. et al., Ct. App. La., 2 Cir., 1957, 98 So. 2d 583.

tice, Article 21, as amended, with reference to the abatement of actions, and LSA-C.C. Article 2315 concerning tort actions and the survival thereof."

In amending the judgment entered by the trial court the Court of Appeal used this language, which may be characterized as epitomizing its holding (125 So. 2d at p. 19):

> ". . . We further hold that the District Court was in error in denying the motion of the surviving widow, Mrs. Alice Peters Dumas, to be substituted as party plaintiff, and we conclude that she is the only proper party plaintiff in these proceedings . . . .
>
> "This is the action of John Stanley Dumas to recover damages for suffering, disability, medical expenses and loss of earnings. The case stands or falls on his entitlement to damages and not on the entitlement of the substituted party plaintiff. . . .
>
> "We, therefore, are of the opinion that although Mrs. Dumas was guilty of contributory negligence proximately causing the accident, she is not thereby barred from recovery as a substituted party plaintiff in these proceedings."

This decision, which seems to be the last one decided by a Louisiana appellate court, seems to repudiate much of the *Addison* decision, although it would seem to strengthen the claim of the husband here to be substituted to any

claims his wife might have had against him — and the record fails to show whether she did have such claims or not — as distinguished from the claims of any beneficiaries under the statute.

Under the unsettled state of the Louisiana law on the subject and, as the parties admit, there being no precedent to guide us,[xv] I am not in favor of turning these appellants away when it appears clear that the husband never became vested with any right to sue for any damages accruing to himself, for his negligent killing of his wife, as a beneficiary under the wrongful death statute. I do not believe that justice or any holding of a Louisiana Court in recent years would give support to such a course.

The court below denied appellants' motion to postpone action in this case until the husband's suit in the Louisiana Court has concluded its journey through the appellate courts of Louisiana It is entirely possible that, by the action and holdings of those courts, some light will be shed on the proper course we ought to pursue in this case. At all events, I think the case should be sent back to the district court that it may await the outcome of the case pending in the State Court, and then proceed more in consonance with the requirements of Federal rules, which, in my judgment, are those outlined above. I think justice requires no less, and I respectfully dissent from the affirmance of the judgment of the lower court.

[xv] Whether it is technically applicable or not, Article 21 of 1 LSA Civil Code seems to suggest a course of action which might well be followed here

"In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

PER CURIAM OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18455

MRS. VIRGINIA KELLY, CURTIS MELANCON, HENRY MELANCON, JR., MRS. ELLA LOVIG and LYNN MELANCON,

Appellants,

versus

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(September 19, 1961)

ON PETITION FOR REHEARING

Before RIVES, CAMERON and JONES, Circuit Judges.

PER CURIAM: Relying on the well-settled principle that federal jurisdiction cannot be conferred by consent and may be questioned at anytime, the appellant on petition for rehearing insists for the first time that the action was not removable under 28 United States Code § 1441 and § 1332, because the matter in controversy did not exceed the sum or value of $10,000.00, exclusive of interest and costs. The complaint on behalf of the five brothers and sisters of Mrs. Adams alleged in Paragraph 1 that defendant "is justly and truly indebted unto petitioners in the full sum of $50,000.00, together with legal interest thereon from date of judicial demand until paid." The appellants rely upon the itemization of that amount in Paragraph 9. "Petitioners itemize their claims for damages for the pain and suffering of decedent, the economic value of her life,

and petitioners' loss of affection, companionship and assistance at the sum of $10,000.00 to each of petitioners, totaling $50,000.00 "

Professor Moore refers to the following as the classic statement of the rule:

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

Pinel v. Pinel, 1916, 240 U. S. 594, 596. See 1 Moore's Federal Practice, Paragraph 0.97 [3], p. 891.

This case comes within the latter class since the five plaintiffs seek to enforce a single right of action for the wrongful death of their sister. Art. 2315, La. Civil Code; *Reed v. Warren*, 1931, 172 La. 1082, 136 So. 59; *Texas & Pacific Ry. Co. v. Gentry*, 1896, 163 U. S. 353, 360, 361. The petition for rehearing is therefore

DENIED.

APPENDIX "B"

LAW OFFICES
RAYMOND H. KIERR
1746 National Bank of Commerce Bldg.
New Orleans 12, La.

July 13, 1961

Mrs. Clara R. James, Chief Deputy Clerk
U. S. Court of Appeals
Post Office Building
New Orleans, Louisiana

Dear Mrs. James:

Re: Mrs. Virginia Kelly, et als.
v. Hartford Accident & Indemnity Co.
No. 18,455

In order to reply to your inquiry concerning the status of the suit filed by the decedent's husband in the State Court I spoke with Mr. Nathan Greenberg, attorney of Gretna, and developed the following information:

The twenty-fourth Judicial District Court for the Parish of Jefferson ruled against Mr. Greenberg's client, the decedent's husband, holding that he did not have a cause of action against his own insurer. The judgment was dated November 14, 1960. Mr. Greenberg has taken an appeal to the Fourth Circuit Court of Appeals for the State of Louisiana.

Mr. Greenberg states that the basis of his appeal is the

case of *Dumas v. United States Fidelity & Guaranty Company*, 125 So. 2d 12, decided by the Third Circuit Court of Appeals for the State of Louisiana on November 30, 1960, which he feels supports the position of his client. He believes that this case is in conflict with *Addison v. Employers Mutual Liability Insurance Company*, 64 So. 2d 484 (La. App., 1st Circ., 1953), which was the basis of the adverse decision from which he has appealed.

If there is any further information I may give, I shall be pleased to have you call on me.

Sincerely yours,

/s RAYMOND H. KIERR

RHK/mdg
cc: Nathan Greenberg, Esq.

[*N. B. The foregoing letter was sent to the office of the Clerk of the Court of Appeals in response to a telephonic inquiry from that court as to the status of the husband's suit.*]